Supreme Court, U. S.
FILED
JUN 11 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-1803

RONALD HACKENBERGER d/b/a
RON'S TRUCKING SERVICE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BERNARD S. GOLDFARB
1825 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
Attorney for Petitioner

Of Counsel:
GOLDFARB & REZNICK

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Opinions Below 1
Statement of Jurisdiction 2
Question Presented 2
Regulatory Provisions Involved 2
Statement of the Case 3
Reasons for Granting This Writ 5

I. This Case Presents Important Issues of National Labor Policy Requiring Resolution by This Court 5
II. The Decision of the Sixth Circuit Below Is in Conflict With the Spirit of This Court's Decisions 10
III. The Decision of the Sixth Circuit Below Is in Conflict With the Decisions of the Courts of Appeals of Other Circuits 13
IV. This Case Presents a Good Vehicle for This Court to Consider and Decide the Issues Presented Herein 17

Conclusion 18
Appendix:

Order of the Court of Appeals Denying Petition for Rehearing En Banc A1
Order of the Court of Appeals A2
Decision and Order of the National Labor Relations Board A4
Decision of Administrative Law Judge A6

TABLE OF AUTHORITIES

Cases

Atlas Industries v. NLRB, ... F. Supp. ...., 91 LRRM 2676 (N.D. Ohio 1976) 6

Bellingham Frozen Foods v. Henderson, 91 LRRM 2761 (W.D. Wash. 1976) 5

Capital Cities Communications, Inc. v. NLRB, ... F. Supp. ...., No. C-75-2352 (N.D. Calif. 1976) 6

Cessna Aircraft Co. v. NLRB, ... F. Supp. ...., 90 LRRM 2376 (D.C. Kan. 1975) 5

Climax Molybdenum Co. v. NLRB, ... F. Supp. ...., 78 L.C. ¶11,257 (D.C. Colo. 1975) 6

Deering Milliken, Inc. v. Nash, ... F. Supp. ...., 90 LRRM 3138 (D.C.S.C. 1975) 5

Electromec Design Co. v. NLRB, 409 F.2d 631 (9th Cir. 1969) 5, 15

Firestone Synthetic Fibers Company v. NLRB, 374 F.2d 211 (4th Cir. 1967) 5

Goodfriend Western Corp. v. Fuchs, ... F. Supp. ...., No. 76-644-T (D.C. Mass. 1976) 5

Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502 (1960) 11, 12

Harvey's Wagon Wheel, Inc. v. NLRB, ... F. Supp. ...., 78 L.C. ¶11,128 (N.D. Calif. 1976) 6

Hickman v. Taylor, 329 U.S. 495 (1947) 12

Jamco International, Inc. v. NLRB, ... F. Supp. ...., No. 76-C-3 (N.D. Okla. 1976) 6

Kaminer v. NLRB, ... F. Supp. ...., 78 L.C. ¶11,272 (S.D. Miss. 1975) 6

Kent Corporation v. NLRB, ... F.2d ...., 78 L.C. ¶11,385 (5th Cir. 1966) 6

Local 32, Plumbers and Pipefitters v. NLRB, ... F. Supp. ...., 78 L.C. ¶11,383 (W.D. Wash. 1976) 6

Maremont Corp. v. NLRB, ... F. Supp. ...., No. Civ. 76-0098 (W.D. Okla. 1976) 5

McClain Industries, Inc. v. NLRB, 381 F. Supp. 187 (E.D. Mich. 1974), *rev'd on juris. grounds*, 88 LRRM 2071 5

Morgan v. United States, 304 U.S. 1, 58 S. Ct. 773 (1937) 10, 11

Morgan Precision Parts v. NLRB, 444 F.2d 1210 (5th Cir. 1971) 5, 15

Mylan Pharmaceuticals, Inc. v. NLRB, ... F. Supp. ...., No. 76-79 (N.D. Pa. 1976) 6

NLRB v. Bean & Son, Inc., 450 F.2d 93 (5th Cir. 1971) 5, 15

NLRB v. Gleason, Inc., ... F.2d ...., 78 L.C. ¶11,309 (2d Cir. 1976) 5, 16

NLRB v. Globe Wireless, Ltd., 193 F.2d 748 (9th Cir. 1951) 5

NLRB v. Interboro Contractors, Inc., 432 F.2d 854 (2d Cir. 1970) 5, 15

NLRB v. Leprino Cheese Co., 73 LRRM 2865 (10th Cir. 1970) 5

NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978 (2d Cir. 1975) 5

NLRB v. Miami Coca Cola Bottling Co., 403 F.2d 994 (5th Cir. 1968) 5, 15

NLRB v. Rex Disposables, 494 F.2d 588 (5th Cir. 1974) 5, 14, 15

NLRB v. Safeway Steel Scaffolds Co. of Ga., 383 F.2d 273 (5th Cir. 1973), *cert. den.* 390 U.S. 955 (1968) 5
NLRB v. Southern Materials Company, 345 F.2d 240 (4th Cir. 1965) 5, 14
NLRB v. Valley Mold Co., Inc., ... F.2d .... (6th Cir. 1976) 5
NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402 (7th Cir. 1961) 5
Production Molded Plastics v. NLRB, 91 LRRM 2753 (N.D. Ohio 1976) 6
Rasar Tanning Co. v. NLRB, 276 F.2d 80 (6th Cir. 1960) 5
Roger J. Au & Son, Inc. v. NLRB, 405 F. Supp. 1200 (W.D. Pa. 1976) 6
Russell Stover Candies, Inc. v. NLRB, ... F. Supp. ....., 89 LRRM 2670 (W.D. Mo. 1975) .. 6
Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223 (5th Cir. 1972) 5, 15
Theron's Country Store v. NLRB, 88 LRRM 2109 (N.D. Ohio 1974) 5
Title Guarantee v. NLRB, ... F.2d ...., 78 L.C. ¶11,363 (2d Cir. 1976) 6
Trojan Freight Lines v. NLRB, 356 F.2d 947 (6th Cir. 1966) 5
United States v. Procter and Gamble Co., 356 U.S. 677 (1958) 12

Statutes and Regulations

5 CFR Part 305, §305.70-4 8
28 CFR §101.7 10
28 CFR §101.9 10
28 CFR Part 102, §102.118 ..... 2, 6
29 CFR Part 102, §102.30 ..... 2, 7

5 U.S.C. §571 9
28 U.S.C. §1254(1) 2
29 U.S.C. §141 9
29 U.S.C. §161 7

Other

Berger, *Discovery in Administrative Proceedings*, 12 AD. L. BULL. 28 (1959) 8
Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch Up With the Courts*, 46 A.B.A.J. 74 (1960) 8
Code of Professional Responsibility D.R. 6-101, D.R. 7-101 9
Cox, *Adherence to the Rules of Evidence and Federal Rules of Civil Procedure As a Means of Expediting Proceedings*, 12 AD. L. BULL. 51 (1959-60) 8
DAVIS, ADMINISTRATIVE LAW TREATISE, Section 8.15 7
Gallagher, *Use of Pre-Trial As a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings*, 12 AD. L. BULL. 44 (1959-60) 8
Garvey, *Prehearing Discovery in NLRB Proceedings*, 26 LABOR LAW JOURNAL 710 (1975) 13
Kaufman, *Have Administrative Agencies Kept Pace With Modern Court Developed Techniques Against Delay? A Judge's View*, 12 AD. L. BULL. 103 (1959-60) 8
Markowitz, *Shall There Be Pre-Hearing Disclosure of Witness Statements in NLRB Proceedings?*, 4 LABOR LAW FORUM 1 (1976) 8
40 NLRB Ann. Rep. 202 (1975) 7
NLRB Field Manual, Section 10124-1 10

Supreme Court of the United States

October Term, 1975
No. _____

RONALD HACKENBERGER d/b/a
RON'S TRUCKING SERVICE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner Ronald Hackenberger prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit wherein it was held that the May 2, 1975, order of the National Labor Relations Board should be enforced.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported, but is printed in the Appendix attached hereto, *infra*, p. A2. The decision and order of the National Labor Relations Board is reported at 217 NLRB No. 128 and printed in the Appendix attached hereto, *infra*, p. A4. The Administrative Law Judge's decision is similarly printed in the Appendix attached hereto, *infra*, p. A6.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1976, and Petitioner's request for a rehearing en banc was denied on April 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does the procedure in NLRB proceedings whereby the Board utilizes broad investigative powers yet denies its adversaries any right of discovery deprive such adversaries of due process of law as well as deprive Respondent's counsel of a right to professionally evaluate a case, thereby directly contravene Congressionally declared labor policies which favor settlement of disputes?

REGULATORY PROVISIONS INVOLVED

28 CFR Part 102, Section 102.118

"Except as provided in Section 102.117 of this part. . . , no regional director, field examiner, administrative law judge, attorney, . . . or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without written consent of the Board. . ."

29 CFR Part 102, Section 102.30

"Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition. . ."

STATEMENT OF THE CASE

On September 25, 1974, William F. Brown, Sr., an employee who was terminated by Petitioner Ronald Hackenberger, filed an unfair labor practice charge with the National Labor Relations Board. On November 8, 1974, after the Board had spent six weeks investigating, it issued a complaint. The complaint set December 5, 1974, as a hearing date, giving Petitioner less than one month to investigate and prepare an adequate defense for the administrative trial.

On November 22, 1974, Hackenberger, by his counsel, filed a Motion for Discovery, requesting a list of all witnesses the Regional Director intended to call and giving notice that he would be taking the deposition of William F. Brown, the charging party. The right to depose other witnesses was reserved. Four days later the Regional Director informed Hackenberger that his notice to take the charging party's deposition was being treated, pursuant to NLRB rules and regulations, as an application to take depositions. In the same letter, the Regional Director concluded:

> After due consideration, good cause not having been shown, request to take the deposition of the charging party in the above-named case, along with depositions of other witnesses expected to be called by counsel for the General Counsel, is hereby denied.

Thereafter, the General Counsel vehemently opposed Hackenberger's request for a list of the anticipated witnesses on the grounds that furnishing such information would be contrary to the Board's rules and regulations. The General Counsel further argued that Hackenberger's discovery motion should be denied be-

cause discovery provisions of the Federal rules are not applicable to Board proceedings.

At the hearing the Administrative Law Judge denied the Motion for Discovery on the basis of long standing Board authority, even though he later admitted that the time may be right for review of established Board procedure.

Testimony elicited by the General Counsel at the hearing was directed to show that William Brown was discharged by Hackenberger for union activity. Hackenberger, on the other hand, testified that the major and primary reason for Brown's discharge was that he had missed work without reporting. Brown's other misconduct—damage to vehicles, bothering mechanics while they were on duty, and disobeying a posted rule by failing to put a tarp over a load of lime—also contributed to the discharge decision according to Hackenberger's testimony.

The Administrative Law Judge, finding Brown's testimony more credible than Hackenberger's, ruled that the employer had failed to prove his defense and thereby had committed an unfair labor practice. In his opinion he stressed the importance of the witnesses' credibility on his decision, saying,

> The validity of Respondent's primary reason for terminating Brown rests critically on the credibility of the Hackenbergers. I do not believe them. Brown impressed me as the far more trustworthy witness.

The Administrative Law Judge then "recommended" that Hackenberger offer immediate reinstatement plus back pay to Brown. His rulings and recommendations

were affirmed by the National Labor Relations Board and the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING THIS WRIT

I. This Case Presents Important Issues of National Labor Policy Requiring Resolution by This Court.

As is demonstrated by the vast amount of litigation contesting the NLRB's anti-discovery policies,[1] the Board's consistent refusal to allow its adversaries any significant prehearing discovery is a hotly disputed

---

1. *NLRB v. Southern Materials Company*, 345 F.2d 240 (4th Cir. 1965); *Firestone Synthetic Fibers Company v. NLRB*, 374 F.2d 211 (4th Cir. 1967); *NLBR v. Rex Disposables*, 494 F.2d 588 (5th Cir. 1974); *NLRB v. Miama Coca Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968); *NLRB v. Safeway Steel Scaffolds Co. of Ga.*, 383 F.2d 273 (5th Cir. 1973), *cert. den.* 390 U.S. 955 (1968); *NLRB v. Bean & Son, Inc.*, 450 F.2d 93 (5th Cir. 1971); *Electromec Design Co. v. NLRB*, 409 F.2d 631 (9th Cir. 1969); *Morgan Precision Parts v. NLRB*, 444 F.2d 1210 (5th Cir. 1971); *Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223 (5th Cir. 1972); *NLRB v. Gleason, Inc.*, ... F.2d ...., 78 L.C. ¶11,309 (2d Cir. 1976); *Rasar Tanning Co. v. NLRB*, 276 F.2d 80 (6th Cir. 1960); *Trojan Freight Lines v. NLRB*, 356 F.2d 947 (6th Cir. 1966); *NLRB v. Valley Mold Co., Inc.*, ... F.2d .... (6th Cir. 1976); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402 (7th Cir. 1961); *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978 (2d Cir. 1975); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854 (2d Cir. 1970); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748 (9th Cir. 1951); *NLRB v. Leprino Cheese Co.*, 73 LRRM 2865 (10th Cir. 1970); *McClain Industries, Inc. v. NLRB*, 381 F. Supp. 187 (E.D. Mich. 1974), *rev'd on juris. grounds*, 88 LRRM 2071; *Theron's Country Store v. NLRB*, 88 LRRM 2109 (N.D. Ohio 1974).

Lately the NLBR's anti-discovery policies have been under strong attack on the grounds that disclosure is warranted by the Freedom of Information Act. *Bellingham Frozen Foods v. Henderson*, 91 LRRM 2761 (W.D. Wash. 1976); *Cessna Aircraft Co. v. NLRB*, ... F. Supp. ...., 90 LRRM 2376 (D.C. Kan. 1975); *Deering Milliken, Inc. v. Nash*, ... F. Supp. ...., 90 LRRM 3138 (D.C.S.C. 1975); *Goodfriend Western Corp. v. Fuchs*, ... F. Supp. ...., No. 76-644-T (D.C. Mass. 1976); *Maremont Corp. v. NLRB*, ... F. Supp. ...., No. Civ. 76-0098 (W.D. Okla. 1976);

(Footnote continued on following page)

issue in labor law. Hence the instant case, where the Petitioner was refused access to a witness list and was not permitted to depose the charging party, is neither a unique occurrence nor an aberration. It is illustrative of typical procedure in Board proceedings.

The fundamental nature of the Board's refusal to engage in discovery is plainly evident from the text of Section 102.118(a) of the Board's Rules & Regulations, where it is proclaimed that no Regional Director shall produce or present any files, documents, or records of the Board without the written consent of the Board. 28 CFR §102.118(a). It was on the basis of this rule that the Board refused Petitioner Hackenberger's request for a witness list.

Similarly, under Board procedure an employer has no right to depose witnesses. Instead, one must apply to the Regional Director or the Administrative Law Judge for permission to take a deposition, and such permission is not granted unless the Board deems that

---

(Footnote Continued)

Production Molded Plastics v. NLRB, 91 LRRM 2753 (N.D. Ohio 1976); *Roger J. Au & Son, Inc. v. NLRB*, 405 F. Supp. 1200 (W.D. Pa. 1976); *Kent Corporation v. NLRB*, ... F.2d ...., 78 L.C. ¶11,385 (5th Cir. 1966); *Kaminer v. NLRB*, ... F. Supp. ...., 78 L.C. ¶11,272 (S.D. Miss. 1975); *Climax Molybdenum Co. v. NLRB*, ... F. Supp. ...., 78 L.C. ¶11,257 (D.C. Colo. 1975); *Local 32, Plumbers and Pipefitters v. NLRB*, ... F. Supp. ...., 78 L.C. ¶11,383 (W.D. Wash. 1976); *Atlas Industries v. NLRB*, ... F. Supp. ...., 91 LRRM 2676 (N.D. Ohio 1976); *Title Guarantee v. NLRB*, ... F.2d ...., 78 L.C. ¶11,363 (2d Cir. 1976); *Russell Stover Candies, Inc. v. NLRB*, ... F. Supp. ...., 89 LRRM 2670 (W.D. Mo. 1975); *Jamco International, Inc. v. NLRB*, ... F. Supp. ...., No. 76-C-3 (N.D. Okla. 1976); *Capital Cities Communications, Inc. v. NLRB*, ... F. Supp. ...., No. C-75-2352 (N.D. Calif. 1976); *Harvey's Wagon Wheel, Inc. v. NLRB*, ... F. Supp. ...., 78 L.C. ¶11,128 (N.D. Calif. 1976); *Mylan Pharmaceuticals, Inc. v. NLRB*, ... F. Supp. ...., No. 76-79 (N.D. Pa. 1976).

good cause has been shown by its adversary. 29 CFR §102.30. In the instant case, Hackenberger's notice of intent to depose the charging party was treated as an application to depose and subsequently denied less than four days later "after due consideration."

The essential unfairness of this widespread practice can be appreciated by an understanding of the broad information-gathering powers which the Board possesses. The Board enjoys strong investigative powers, implemented by a subpoena power, which enables it to obtain before trial all of the records and documents which its adversary holds. 29 U.S.C. §161. Such lopsided discovery not only violates principles of fair play but also contravenes Congressionally declared policy favoring expeditious settlement of labor disputes.

The right to discovery in NLRB proceedings is of sufficient consequence to be considered an important issue even if it arose infrequently. However, the same Board procedure was governing in 58,504 cases on the Book's docket in 1975. 40 NLRB Ann. Rep. 202 (1975). The sheer volume of Board cases to which its one-sided discovery procedures apply sharply increases the overall importance underlying the instant issue.

Legal commentators who have examined the anti-discovery policies in administrative proceedings uniformly agree that there is no justification for the practice. The view of the scholars is aptly summarized in one sentence by Professor Davis at Section 8.15 of his ADMINISTRATIVE LAW TREATISE, where he states:

> Probably no sound reason can be given for failure to extend to administrative adjudications the discovery procedures worked out for judicial proceedings.

Other commentators which have uniformly reached the same conclusion include Kaufman, *Have Aministrative Agencies Kept Pace With Modern Court Developed Techniques Against Delay? A Judge's View*, 12 AD. L. BULL. 103 (1959-60); Berger, *Discovery in Administrative Proceedings*, 12 AD. L. BULL. 28 (1959); Markowitz, *Shall There Be Pre-Hearing Disclosure of Witness Statements in NLRB Proceedings*, 4 LABOR LAW FORUM 1 (1976); Gallagher, *Use of Pre-Trial As a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings*, 12 AD. L. BULL. 44 (1959-60); Cox, *Adherence to the Rules of Evidence and Federal Rules of Civil Procedure As a Means of Expediting Proceedings*, 12 AD. L. BULL. 51 (1959-60); Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch Up With the Courts*, 46 A.B.A.J. 74 (1960).

Even the Administrative Conference of the United States, taking the position that fairness to all concerned should be the primary aim of government, has concluded that administrative agencies should adopt rules favoring discovery. 5 CFR Part 305, §305.70-4. In making that recommendation the Administrative Conference explained:

> Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudications. Agencies that conduct adjudicative proceedings generally enjoy broad investigative powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

The Administrative Conference was initially organized for the express purpose of developing recommendations for action so that private rights in administrative proceedings could be fully protected and regulatory activities could be carried out expeditiously and in the public interest. 5 U.S.C. §571. In spite of the fact that this Conference deemed administrative pretrial discovery of sufficient import to warrant promulgating a specific recommendation, the NLRB has apparently ignored this recommendation because discovery in Board proceedings is still amazingly limited.

Even more important is the fact that the Board procedure of limited discovery directly conflicts with Congressionally declared national policy which favors settlement of labor disputes. 29 U.S.C. §141. The likelihood of settlement or compromise of a dispute is dramatically increased when both parties are able to assess the strength of their own case. In other words, only one who can accurately determine the facts of the dispute is in a position to intelligently decide whether to settle the matter or vigorously defend.

Under present Board procedures where discovery is one-sided, a respondent is in no position to make a determination whether his case should be settled. Certainly an attorney, who is bound under the Code of Professional Responsibility to represent his client zealously and competently, is in no position to bargain for his client and protect that client's interests where he has access to only half of the facts. Code of Professional Responsibility D.R.6-101; D.R.7-101. Hence by inhibiting discovery the Board has imposed a major obstacle in the path of settlements.

Furthermore, by its anti-discovery provisions, the Board is acting contrary to its own Rules which expressly favor settlements. Sections 101.7, 101.9, NLRB Rules and Regulations, 28 CFR §101.7, 101.9. Likewise, the Board's self-expressed policy favoring a "mutually satisfactorily resolution of issues as an alternative to litigation" is directly contravened by the disincentive to settlement which accompanies one-sided discovery. NLRB Field Manual, Section 10124-1.

In other words, resolution of the instant issue is of critical importance because present NLRB procedure, as upheld by the Sixth Circuit below, is manifestly unfair, in conflict with avowed Congressional policies, and generally inconsistent with even the Board's own policies which favor settlement of disputes and expeditious hearings.

II. The Decision of the Sixth Circuit Below Is in Conflict With the Spirit of This Court's Decisions.

This Court has long recognized that requirements of fairness and due process are equally applicable to administrative proceedings. These principles were announced in *Morgan v. United States*, 304 U.S. 1, 58 S. Ct. 773 (1937), a case involving an administrative hearing in the Department of Agriculture. It was there held that liberty and property of the citizen are protected in administrative proceedings by the "rudimentary requirements of fair play." This Court explained that a full hearing—i.e. a fair and open hearing—embraces not only the right to present evidence, but also a "reasonable opportunity to know the claims of the opposing party and to meet them." It further stated that those who are brought into contest with

the government in a quasi-judicial proceeding are entitled to be fairly advised what the government proposes. In particular, the *Morgan* Court concluded that "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding part of the procedure as well as to the beginning and intermediate steps." 304 U.S. at 20.

Although the issue in *Morgan* did not involve pretrial discovery, this Court nonetheless emphasized the principle that the requirement of fairness extends beyond the taking of evidence to earlier steps of administrative procedure.

The Sixth Circuit, in assuming that Board procedure of one-sided discovery is fair, appears to have ignored the guiding language of *Morgan*.

Furthermore, the holding of the Court of Appeals is inconsistent with this Court's holding in *Hannah v. Larche*, 363 U.S. 420, 80 S. Ct. 1502 (1960), where it was explicitly recognized that a party to an administrative proceeding is entitled to those procedural protections which have traditionally been associated with judicial process. In *Hannah*, it was explained:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual context. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. 363 U.S. at 442.

Contrary to the language in *Hannah*, discovery procedures in unfair labor practice proceedings are entirely unlike those in judicial proceedings. Such one-sided discovery seems manifestly unfair as well as in violation of the "mutual knowledge" standard which this Court in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), said was "essential to proper litigation."

This Court has emphasized the importance of discovery in achieving a fair trial. For instance in *United States v. Procter and Gamble Co.*, 356 U.S. 677, 682 (1958), it was stated that discovery together with pretrial procedures "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest extent." In contrast, the result in a Board proceeding is worse than a game of blindman's bluff since only one of the parties, the respondent, is precluded from discovery and the other, the Board, has broad investigative and subpoena powers.

Furthermore, it can hardly be contended that the Court of Appeals below was justified in ignoring this Court's prior decisions on the grounds of protecting the employee's right to be free from the threat of possible retaliation. In the instant case, as is true with any unfair labor practice charge stemming from a wrongful discharge, the employer already knew who the charging party was. Hence if any danger of retaliation existed, it was not alleviated by the Board's refusal to allow Petitioner to depose the terminated worker.

Of more fundamental importance is the fact that even if the Board had a valid interest to protect, its manner of protecting that interest—denying pretrial discovery—is overbroad. In other words, the Board's interest could be equally well protected without totally

sacrificing the other party's need for information. For example, such protection could be afforded by allowing liberal discovery but presuming employer retaliation where any detrimental changes occur in the terms or condition of employment of any witness who is discovered. Such a presumption of retaliation could be rebutted upon the showing of a business justification of a detrimental act taken.

This issue of overbreadth in present Board procedure is thoroughly discussed in a recent article. Garvey, *Prehearing Discovery in NLRB Proceedings*, 26 LABOR LAW JOURNAL 710 (1975).

Hence, although this Court has not yet directly spoken on the issue of whether pretrial discovery is an essential ingredient in administrative proceedings, the plain import from analogous decisions is that discovery is necessary in order to promote fairness, expeditiousness, and peaceful resolution of disputes. The opinion of the Sixth Circuit in this case, which approves of the Board's one-sided discovery approach, directly and without justification violates the spirit of this Court's prior decisions.

III. The Decision of the Sixth Circuit Below Is in Conflict With the Decisions of the Courts of Appeals of Other Circuits.

The majority below rejected Petitioner's argument that Congressionally declared policy as well as basic principles of fairness require that pretrial discovery be a two-way street. In doing so, it stated that the National Labor Relations Act does not require the Board to follow the discovery procedures set forth in the Federal Rules of Civil Procedure. Moreover, the

Court implicitly assumed that present Board procedures conform to the requirements of due process.

While Petitioner does not contend that the Sixth Circuit stands by itself in approving of the Board's practice of effectively denying its adversaries of any opportunity to discover facts surrounding an unfair labor practice charge, it is nonetheless evident that other Circuits have decided the issue differently.

The Fourth Circuit, in *NLRB v. Southern Materials Company*, 345 F.2d 240 (4th Cir. 1965), has observed that since the Board acts in a quasi-judicial capacity it should freely permit discovery in order that the rights of all parties may be properly protected. That court went on to note that the company might have been prejudiced from denial of discovery, reasoning that had discovery been allowed it conceivably could have shown that the charging party's proof was unreliable.

Similarly the Fifth Circuit has recognized the potential for unfairness inherent in the Board's anti-discovery rules. In *NLRB v. Rex Disposables*, 494 F.2d 588 (5th Cir. 1974), the court discussed whether the Administrative Law Judge erred in refusing to allow the employer any discovery. Agreeing with the Fourth Circuit that under some circumstances the Board's decision not to provide discovery may result in unfairness, the court recognized that it had broad discretion to require administrative proceedings to be as just as circumstances allow. Accordingly, the *Rex Disposables* court explained the Fifth Circuit approach as follows:

> This Court is committed to the doctrine that when good cause is shown to the Board it should permit discovery in order that the rights of all parties

> may be protected. We adhere to this doctrine despite the able but highly technical opinion of the Second Circuit in *NLRB v. Interboro Contractors*, 2 Cir. 1970, 432 F.2d 854. The function of judges is to administer justice without respect to persons. 28 U.S.C. §453. They must refuse to enforce administrative orders which they find to be unjust or the product of unjust administrative procedures or policies (citations omitted) 494 F.2d at 592.

Although the court in *Rex Disposables* went on to find that the employer there was not actually prejudiced by the absence of discovery, it nonetheless recognized the basic unfairness of present Board procedures.

Also, in *NLRB v. Miami Coca Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968), another view of the Fifth Circuit position was stated:

> If discovery is practicable in the circumstances of the case and if it is not used to harass or coerce employees, the Board, acting in a quasijudicial capacity as it does, should freely permit discovery in order that the rights of all the parties may be properly protected. 403 F.2d at 996.

Other Fifth Circuit decisions containing similar analyses include *NLRB v. Bean & Son, Inc.*, 450 F.2d 93 (5th Cir. 1971); *Morgan Precision Parts v. NLRB*, 444 F.2d 1210 (5th Cir. 1971); and, *Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223 (5th Cir. 1972).

The Ninth Circuit in *Electromec Design Co. v. NLRB*, 409 F.2d 631 (9th Cir. 1969), implicitly held that a respondent may be denied due process of law when not given the right to discovery prior to a NLRB hearing if he can demonstrate clear prejudice.

Even the Second Circuit, which had previously approved of Board procedure, recently clarified its position. *NLRB v. Gleason, Inc.*, ... F.2d ....., 78 L.C. ¶11,309 (2d Cir. 1976). It was there stated that the granting of discovery and disclosure is in the discretion of the hearing examiner, but that where the respondent is able to demonstrate that he would be clearly prejudiced by denial of discovery, such a denial would constitute an abuse of discretion.

Hence there is wide variance between the stand taken by the Sixth Circuit below—that the Board's one-sided discovery approach is unobjectionable—and that taken in the Second, Fourth, Fifth, and Ninth Circuits.

In the instant case the prejudicial effect of the denial of discovery is easily demonstrable. Here the Administrative Law Judge openly admitted that the key factor in his determination was one of credibility—the charging party's versus the employer's. By denying the employer's motion for discovery, the Regional Director and Administrative Law Judge prevented Hackenberger from using the tools which litigants traditionally use to obtain information necessary to discredit an opposing witness. The right of cross-examination is an empty right when identity of opposing witnesses is unknown up to the time of the hearing. It is likewise a hollow right when the cross-examiner has been precluded from taking the deposition of his opponent's witnesses. Only through the use of these devices does the cross-examiner obtain the ammunition necessary to make cross-examination meaningful.

Also, a litigant who has no advance notice of the position which his adversary is taking is in no position

to determine what aspects of his own case are in need of corroboration. Not having heard the charging party's version of the story, a litigant is unable to anticipate which portions, if any, of his testimony will be challenged, and thus need to be strengthened. In the instant case, Petitioner Hackenberger could have corroborated his own testimony if he had been given advance notice of the charging party's recollection of events. Instead, Petitioner was caught by surprise and this ability to corroborate was seriously impaired.

Hence prejudice in the case at bar can be easily pinpointed. In some Circuits it is recognized that such prejudice is convincing evidence that the error in denying prehearing discovery is more than a harmless, technical mistake; i.e., the error rose to the level of depriving a party from effectively challenging the credibility of a determinative witness—a denial of due process. The Sixth Circuit, however, has nonetheless approved the Board's actions. This kind of unreasoned, unexplained conflict among the Circuits causes uncertainty and loss of confidence in the law and generates much unnecessary litigation. It is precisely this problem which this Court's certiorari jurisdiction was designed to remedy.

IV. This Case Presents a Good Vehicle for This Court to Consider and Decide the Issues Presented Herein.

The facts of this case present the competing policy interests involved in their clearest and most compelling light and therefore provide this Court with an optimal opportunity to consider and decide the substantial and unresolved legal issues involved.

Throughout the administrative proceedings, Petitioner repeatedly requested that Board for the opportunity to engage in discovery. Each request was flatly refused. In light of the Administrative Law Judge's candid admission that the key factor influencing his decision was one of credibility, the prejudicial effect of the Board's anti-discovery policies is easily demonstrable.

These facts present an administrative law issue of nationwide concern which the various Circuits have resolved inconsistently, and which the Sixth Circuit has resolved contrary to both Congressionally declared national policy and the analogous holdings of this Court.

CONCLUSION

Petitioner prays that this Court grant his petition for a Writ of Certiorari.

Respectfully submitted,

BERNARD S. GOLDFARB
1825 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
216-781-0383
Attorney for Petitioner

Of Counsel:
GOLDFARB & REZNICK

APPENDIX

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING EN BANC

(Filed April 27, 1976)

No. 75-1800

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RONALD HACKENBERGER d/b/a RON'S TRUCKING SERVICE,
Respondent.

ORDER

Before: PECK, McCREE and MILLER,* *Circuit Judges.*

In this action the appellee, Ronald Hackenberger, d/b/a Ron's Trucking Service, on March 22, 1976, filed a petition for rehearing en banc. It appearing that no judge of the Court in active service has voted in favor of such a hearing, and the panel which originally heard the case being of the opinion that the petition is without merit;

---

*Judge Miller concurred in this order prior to his death on April 12, 1976.

It is therefore ORDERED and ADJUDGED that the said petition for rehearing en banc be and the same is hereby overruled.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE COURT OF APPEALS

(Filed March 9, 1976)

No. 75-1800

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RONALD HACKENBERGER d/b/a RON'S TRUCKING SERVICE,
Respondent.

ORDER

Before: PECK, McCREE and MILLER, *Circuit Judges.*

This case is before the Court upon application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, (29 U.S.C. Sec. 151, et seq.) for enforcement of its order issued against Ronald Hackenberger, doing business as Ron's Trucking Service, and finding that the defendant company had violated Sec. 8(a)(3) and (1) of the Act by discharging employee, William Brown, because of his

protected union activities in conducting a campaign among his fellow employees to organize support for representation by the union. The Board's decision and order are reported at 217 NLRB No. 128.

Upon an examination of the record, and upon consideration of the briefs and oral arguments, we are of the opinion that the Board's findings that the company violated Sec. 8(a)(3) and (1) of the Act in discharging employee, William Brown, are supported by substantial evidence.

The Board's determination cannot be overruled on the basis of the Administrative Law Judge's refusal to grant the company's motion for a continuance of the hearing. Whether or not a continuance should be granted is a matter which lies within the Board's discretion and absent a showing of clear abuse of discretion by the Board and prejudice to the moving party, its refusal to grant the continuance will not be disturbed. *National Labor Relations Board v. Rawac Plating Company*, 422 F.2d 1259, 1261 (6th Cir. 1970). It is strenuously argued by the company that the Board erred in denying the company's motion for discovery pursuant to the Federal Rules of Civil Procedure. This contention on the part of the company must be rejected on the basis of our recent ruling in *National Labor Relations Board v. Valley Mold Company, Inc.*, decided February 17, 1976, No. 75-1292. In that case this Court held that the National Labor Relations Act "does not require the Board to follow the discovery procedures set forth in the Federal Rules of Civil Procedure." As further held in that case:

> . . . Since there is no specific provision in the Act for discovery procedures, it is the responsibility of

the Board, so long as it conforms to the requirements of due process, to formulate its own rules as to when discovery is available to a party.

It is therefore ORDERED and ADJUDGED that the Board's order of May 2, 1975, be enforced in full in accordance with its terms.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Dated May 2, 1975)

Case 8-CA-8622

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

RONALD HACKENBERGER d/b/a RON'S
TRUCKING SERVICE
and
WILLIAM F. BROWN, SR., an Individual

DECISION AND ORDER

On January 29, 1975, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Ronald Hackenberger d/b/a Ron's Trucking Service, Norwalk, Ohio, his agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. May 2, 1975.

Betty Southard Murphy, Chairman
John H. Fanning, Member
John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

1. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION OF ADMINISTRATIVE LAW JUDGE

(Dated January 29, 1975)

Case No. 8-CA-8622

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

WASHINGTON, D.C.

RONALD HACKENBERGER d/b/a RON'S TRUCKING SERVICE

and

WILLIAM F. BROWN, SR., An Individual

DECISION

Statement of the Case

JOEL A. HARMANTZ, *Administrative Law Judge*: This case was tried in Norwalk, Ohio, on December 5, 1974, upon a charge filed on September 25, 1974, an amended charge filed on October 31, 1974, and upon a complaint issued on November 8, 1974, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate William F. Brown, Sr., in order to discourage union membership. In its duly filed answer, Respondent denied that any unfair labor practices were committed. After close of the hearing briefs were filed by the General Counsel and the Respondent.

Respondent, at the hearing, made certain preliminary motions. In its posthearing brief, Respondent seeks dismissal of the complaint alleging error in my

rulings, denying said motions. The request that the complaint be dismissed is denied, essentially for the various reasons already expressed upon the record. However, further comment is necessary with respect to my denial of Respondent's motion for a continuance. Said motion was made prior to the taking of any evidence, and based on the claim that Respondent was unable to complete his investigation and adequately prepare for trial. Insofar as that claim was based upon Respondent's pending motions for discovery, in the circumstances involved here, Respondent was not entitled to a continuance simply because he may have elected to forestall trial preparation while awaiting a ruling upon his request. There may indeed be circumstances where it is "reasonable" and "necessary" for a party to await disposition of pretrial motions before preparation for a trial. See *Sutherland Paper Co. v. Grant Paper Box Co.*, 183 F.2d 926 (C.A. 3 1950), cert. denied, 340 U.S. 906. However, this is not such a case. Respondent's pretrial effort to secure discovery was in a form universally denied under a long line of consistently applied Board authority. As an experienced practitioner before the Board, Respondent's counsel knew or should have known that his chances for favorable action on the discovery motion either before or at the hearing, were nil. To honor a request for a continuance, in such circumstances, would rest upon acceptance of a view that the mere filing of pretrial motions, licenses the moving party to defer pretrial preparation, and to perfect such a choice, by involving an automatic right to postponement at the hearing. Such a view would afford blind primacy to unsubstantiated assertions of due process rights in a manner prejudicial to the interests of the other parties to the litigation, as

well as to the statutory policies encouraging that Board remedies be invoked, processed, and resolved, without unnecessary delay.

Respondent's request for a continuance was also predicated upon grounds that, since the complaint was received by Respondent's counsel on November 11, 1974, with the hearing scheduled for December 5, 1974, Respondent in the interim did not have adequate time to investigate the facts and prepare his case. From my impression of the issue raised by the pleadings and following discussion, in that regard, with Respondent's counsel I could not conclude that the time allotted for preparation of the defense was inadequate. Though afforded an opportunity, Respondent's counsel could not specify why the time provided was insufficient. His subjective generalities furnished no basis for objective determination that there was merit in his position. Nonetheless, denial of the motion, was subject to the express reservation that I would reconsider if at any point in the hearing, it should develop that the issue presented by the complaint proved more complex and required greater preparation than was apparent at the time of ruling. At no time prior to close of the hearing, did Respondent's counsel renew said motion. Furthermore, from Respondent's presentation, during the course of the 1-day hearing there was no suggestion that the defense was in any sense handicapped by a lack of preparation, and, indeed, no specifics to the contrary were set forth in Respondent's brief.

Upon the entire record, including my observation of the witnesses while testifying, and after due consideration of the posthearing briefs, I make the following:

Findings of Fact

I. Respondent's Business

Respondent is a sole proprietorship with its sole facility located in Norwalk, Ohio, from which it is engaged in the transportation, by motor carrier, of stone, lime, sand and other aggregates. Respondent, in the course of its trucking operations in the State of Ohio, annually derives gross income in excess of $50,000 for services and operations performed for the Federal Lime and Stone Company, Cleveland, Ohio, which business enterprise annually ships goods valued in excess of $50,000 from its Ohio facilities directly to points located outside of that State.

The complaint alleges, the answer admits, and I find that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the amended answer admits, and I find that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 20, is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

A. *The Issue*

The sole question presented in this case is whether William Brown, Sr., was discharged because of his union activity, as the General Counsel claims, or because of successive failures to show up for work, a history of vehicle abuse, and other misconduct, as Respondent claims.

B. *Concluding Findings*

Respondent is a small, family held trucking concern which operates about 18 trucks through a workforce ranging from 15 to 20 employees depending upon seasonal demands. There is no bargaining history for Respondent's employees. Ronald Hackenberger is the sole owner of the operation and he and his wife Eunice are its sole managers. Respondent's only operating facility shares the same premises with the Hackenberger's home. At the rear of the house there is a parking area and a garage where the trucks are maintained and repaired. The office, which is run by Eunice Hackenberger, is located in the house. Respondent hauls sand, stone, lime and coal for various consignors, including Republic Steel, Huron Lime, and Federal Lime and Stone.

William Brown, Sr., was hired by Hackenberger as a driver in July 1974.[1] Brown, in late August, contacted representatives of Local Union No. 20, International Brotherhood of Teamsters, in furtherance of his interest in union representation. In consequence a union official agreed to meet with Brown, and any other interested employees of Respondent, at a location referred to herein as the Horseshoe Bar. Thereafter, Brown informed various employees of the meeting that had been set up. Hackenberger admitted that prior to the meeting, one of his drivers, Bob Runyon, told him that the men were going to have a union meeting.

On the evening of September 6, two representatives of Local Union No. 20, Ben Paullen and Robert Robaszkjewicz, arrived at the Horseshoe Bar, and

1. All dates referred to 1974 unless otherwise indicated.

asked to be directed to employees of Respondent. Brown subsequently arrived and sat at a table with the union representatives. They discussed organization of Respondent, and Brown was given union membership cards, instructed to get them signed by a majority, and then to contact the Union.

Also present at the Horseshoe Bar that evening was Clois Skaggs, another of Respondent's drivers. When the union representatives entered, Skaggs telephoned Ron Hackenberger, advising him that two union men were at the Bar, asking for employees of Ron's trucking.[2] Hackenberger informed Skaggs that he would come down to the Bar.

About one-half hour later, Hackenberger appeared at the Horseshoe Bar. The union representatives had left prior to his arrival, and according to Hackenberger, Clois Skaggs and Brown were present. Skaggs told Hackenberger that Brown had been sitting with the union men. Brown testified, without contradiction, that Hackenberger, on arriving at the Bar, appeared angry, and though Hackenberger spoke to Skaggs, Brown was ignored by Hackenberger when Brown attempted to speak to him.

After this meeting, Brown discussed the Union with various employees in an effort to enlist their support. He also distributed authorization cards and solicited employee signatures thereto.

2. Ron Hackenberger initially testified that he could not recall whether Skaggs referred to the two men as "union men" during this telephone conversation. Based upon Skaggs' testimony and the plausibilities, I cannot imagine that Skaggs in the course of this telephone conversation did not identify the strangers as "union men." When Skaggs called Hackenberger, he knew their union status. Apparently that knowledge, and the desire to communicate it to Hackenberger is precisely what prompted the phone call.

Some 3 weeks after the meeting at the Horseshoe Bar, and on Tuesday, September 24, Brown was terminated. On the previous day, Brown had a conversation with a newly hired driver, Terry Reddix, in which Reddix was asked if he was interested in having a union. On the day prior to Brown's discharge, Monday, September 23, Reddix after returning from a trip, told Eunice Hackenberger that he had seen Brown and asked her if Respondent was a union shop. She said, "no."[3]

On Tuesday, September 24, Brown reported for work, but found that he had not been assigned a trip. He approached Ron Hackenberger, who questioned Brown as to his failure to report for work the previous Sunday. After Brown attempted to explain, that he had received no assignment for Sunday, Hackenberger stated that since the incident at the Bar, Brown had become a "union agitator." Brown asked what Hackenberger meant by those terms, but no clarification was afforded. Brown denied saying anything to anyone. Hackenberger then said, "that's the reason you are losing your job because you haven't said anything to anyone." Brown asked, "does that mean I'm fired?" Hackenberger said, "yes." Brown then collected his belongings and left the premises.[4]

---

3. Based upon the credited, uncontradicted testimony of Reddix, who at the time of the hearing, remained in the employ of the Respondent.

4. Hackenberger denied that, in discharging Brown, he accused Brown of being a "union agitator." Instead, according to Hackenberger he told Brown that he would be fired for not showing up for work and secondly for "agitating," a couple of driver mechanics. I credit Brown and the above account of the discharge conversation is based upon his testimony. Hackenberger's testimony, through which he attempted to explain away the term agitating as having no intended reference to Brown's union activity, was unpersuasive. Thus, Hackenberger related that he either used the term aggravating or agitating because Brown had been talking to on-duty mechanics. This attempt to mitigate is hardly believable when considered against Hackenberger's own admission that he recalled telling a Board investigator that the term agitating was used because Brown had approached employees Terry Reddix and James Koch about joining a union. Furthermore as shall be seen *infra*, I was not impressed with the reliability of Hackenberger's testimony generally and regarded Brown as the far more credible witness.

Aside from the foregoing, Ron Hackenberger, during examination by his own counsel admitted that Brown's union activity affected Hackenberger's discharge decision.[5]

Said admission is significant in two major respects. First, it confirms that Hackenberger knew or suspected that Brown was an employee organizer. Second, it discloses, Hackenberger's animus towards the organizational effort and Brown's role in it. Hackenberger's opposition to union representation; the discharge of Brown, the principle [sic] employee organizer within 3 weeks of Hackenberger's discovery of the union meeting at the Horseshoe Bar, and on the day after his wife received the report that the dischargee had

---

(Footnote Continued)

5. The above admission appears in the following excerpt of a colloquy between Respondent's counsel and Hackenberger:

> Q. Did you have any knowledge, as a matter of fact, that Mr. Brown was engaged in union activity?
>
> A. Through hearsay, yes.
>
> Q. Did that effect [sic] your decision to discharge William Brown in any way?
>
> A. I would say in a minor portion. I won't say that would in any way, but I have heard—.
>
> Q. What was the primary factor?
>
> A. The missing of work.

discussed the Union with a new hire, give rise to an inference that the discharge was predicated upon unlawful antiunion considerations, and suffices to establish a *prima facie* case. Accordingly, at this juncture, the question that arises is whether Respondent's evidence as to legitimate considerations prompting the discharge is sufficiently compelling to overcome the inference of legality that arises from the facts set forth above.

By way of defense, Respondent contends that the major or dominant reason, and the precipitating cause of the discharge, was Brown's failure to report for work, which caused him to miss scheduled loads on September 22 and 23. Respondent further argues that other factors contributing to the discharge were Brown's history of damaging equipment, his interfering with the work of the mechanics, and his violation of Company rules, and other work related deficiencies. Of the various considerations offered in justification of Respondent's action, only one is material. Hackenberger's testimony, if it does not concede, unmistakably implies that he would not have discharged Brown had Brown not failed to show up for loads which allegedly were assigned to him for September 22 and 23. It would be difficult for Hackenberger to contend otherwise, for the secondary considerations set forth above which were known by Hackenberger at the time of the discharge had, till then, been condoned. Therefore, a proof [of] failure as to Respondent's alleged dominant reason for the discharge would impel the finding of a violation, and a valid defense, in that event could not be salvaged from aspects of Brown's work performance which would not alone have prompted his discharge.

Turning to the merits of Respondent's claim that Brown was terminated because of his failure to report for work on September 22 and 23, I note at the outset that as is true in the case of any successful business venture, Respondent had a legitimate concern to assure that its customers were provided efficient and reliable service. To this end, Respondent had every right to expect that its drivers would be available to haul *scheduled* loads, or to report in if they could not make a *scheduled* run. Brown conceded that the drivers, at the time of their hire, are informed as to the importance of these matters. In addition, a notice is posted in the garage that drivers will be subject to a $5 fine for missing a days' work without reporting in.

On the other hand, it is also clear, that Respondent's drivers worked no fixed shifts and have no regular daily starting times. They receive no hourly rate or guarantee, but are paid exclusively on a percentage-of-haul basis. Their driving assignments are made on the afternoon of the day preceding the trips. Shortly before Brown's discharge, Respondent changed its method of assigning loads to the drivers. Under the old system, the runs would be assigned by direct communication with Eunice or Ron Hackenberger, either in person or by the telephone. However, on Sunday, September 15, that system was replaced by another, apparently designed to relieve the Hackenbergers from effecting trip assignments through direct communication with drivers. Under the new system, each afternoon at between 2 and 3 p.m., Eunice Hackenberger would prepare a card for each driver, indicating their assignment for the succeeding day. She would then place the card in a manilla envelope, which, in turn, she

deposited in a box in a telephone booth located on Respondent's premises. The drivers in the evening after returning from their daily runs would check that box for their next day's assignment.

According to Brown, on Saturday, September 21, he returned from his last run late in the evening somewhere around 7:30 p.m. He checked the work assignment box and found it empty, with no work assignments at all. Brown therefore assumed that there would be no work for him on Sunday and he did not come in. This assumption on Brown's part was not lacking in prudence, for, Ron Hackenberger admitted that only half of the driver complement was necessary to cover the normal Sunday work load at that time of the year.

Brown next reported for work Monday, September 23, at about 6 a.m. According to Brown his work assignment for that morning was in the box in the telephone booth, and, accordingly, Brown, on his own, took his truck and proceeded to deliver his loads. Brown's first run required him to report at 2 a.m. that day, and it was missed. During the second run, Brown's truck broke down. Brown stayed with the truck from 1:00 p.m. until 6:30 p.m. that evening when Eunice Hackenberger picked Brown up. She took Brown to Huron Lime where he picked up another truck and was assigned another run. Brown did not complete his work that evening until 2:30 a.m., Tuesday morning. At that time he returned to Respondent's premises, but found no work assignment in his box. The next day Brown reported for work at about 9 a.m. and it was on this occasion that he had the conversation with Ron Hackenberger, previously set forth in the text, which culminated in his discharge.

In contrast with Brown, Eunice Hackenberger testified that on Saturday, September 21, she made out the job assignments for the drivers between 2 and 3 o'clock that afternoon. She claims that she assigned Brown two separate runs out of Republic Steel for Sunday morning, with a reporting time of 7 a.m. She claims that she, herself, put this assignment in the appropriate box in the telephone booth. She testified that she did not return to retrieve the materials on deposit in the telephone booth until the following Sunday, around noontime. She further testified that since Brown did not show up on Sunday, his loads were distributed to other drivers who were on the premises That afternoon, while preparing the Monday schedule, she claims to have discussed Brown's situation with her husband and pursuant to his suggestion, she gave Brown three loads on Monday, the first of which would require him to report in at 2 a.m. Monday morning.[7] If Mrs. Hackenberger's testimony is to be believed, it would be a fact that Brown missed three scheduled loads in succession on Sunday and Monday. Mrs. Hackenberger concedes that on Monday afternoon after Brown's truck broke down, she picked him up, but did not at that time say anything to him concerning his failure to report for any scheduled loads.

Ron Hackenberger testified that when he woke up on Sunday, September 22, he discovered that Brown had not reported for work. Brown's truck was still on the premises, so Brown's assignment for that day was rescheduled and given to other drivers. Hackenberger

---

6. These drivers, though identified, were not called in corroboration of Eunice Hackenberger.

7. Brown credibly testified that he normally was assigned two trips per day, but sometimes was given three.

testified that he did not discharge Brown at that time because he felt that, perhaps, Brown might show up to wash his truck that day and relates that he decided that he would give Brown a second chance by assigning him a job for Monday morning at 2 a.m. However when Brown did not show up for the 2 a.m. trip, and Hackenberger woke up at 9:30 a.m. on Monday and discovered this, according to Hackenberger, he at that time decided to fire Brown. However, Hackenberger did not see Brown that day and hence the discharge did not occur until Tuesday morning.

The validity of Respondent's primary reason for terminating Brown rests critically on the credibility of the Hackenbergers.[8] I do not believe them. Brown impressed me as the far more trustworthy witness. His testimony was straightforward and candid, and he openly admitted without detectable coloration various aspects of his employment history that were unfavorable to him and ultimately cited by Respondent as secondary reasons for his termination. Ron Hackenberger, in contrast, was evasive, contradictory, and reflected a lack of recollection as to certain matters of such importance as to create the impression that he tended to inject memory lapses as a shield to cover matters prejudicial to the defense.

Consistent with my observations, in this respect Hackenberger testified as to a lack of recollection that Skaggs told him that the two strangers at the Horseshoe Bar were "union men." In the light of Hacken-

---

8. The trip ticket, allegedly placed in Respondent's telephone booth on Saturday afternoon, and allegedly bearing Brown's work assignment for both Sunday and Monday, placed in evidence as Respondent's Exhibit 5 is of no greater force then [sic] the parole testimony of Eunice Hackenberger and her credibility.

berger's interest during the phone conversation in what the two men were doing at the bar, as well as his action in immediately going to the bar to investigate, I cannot believe that Hackenberger could not recall so significant a fact. Contributing further to my belief that Hackenberger deliberately attempted to conceal the full extent of his knowledge of union activity and Brown's involvement in the Union was his initial testimony that he had no direct knowledge of Brown's union activity and that he did not take seriously reports from employees that Brown was so engaged. Also part of this pattern was Brown's attempt to explain away, as nonunion related, his remark to Brown, during the discharge interview, that Brown was agitating other employees. In contrast to these efforts to diminish the significance of Brown's known or suspected union involvements, Hackenberger, on subsequent examination by his counsel admitted that Brown's union activity had some influence upon the discharge decision. Respondent in its brief describes this admission as candid. Perhaps, it was, but in the circumstances, the admission confirms, rather than puts to rest, my doubt as to Hackenberger's trustworthiness. The admission came too late, and involved no more than what was already inferrable from testimony then in the record, which included Hackenberger's reluctant concession that he recalled telling a Board agent that he accused Brown of agitating because Brown had reportedly discussed the Union with Koch and Reddix. The admission that Brown's union activity had something to do with his termination, confirms that Hackenberger, in his earlier testimony, deliberately attempted to downplay his knowledge or suspicion of Brown's union activity, the importance he attached to

reports of Brown's union activity, and that union activity was involved in the discharge decision.

Additional grave questions concerning the testimony of Hackenberger are based on my impressions garnered from observing him testify. Overall, he impressed me as a man on the witness stand, laboring under the strain of relating facts in defense of a pretextual discharge. My disbelief of Ron Hackenberger extends to Mrs. Hackenberger. Her testimony that she placed Brown's work assignment in the telephone booth on Sunday afternoon and retrieved said assignments at 12 noon on Sunday, and her testimony as to having placed the markings on Respondent's Exhibit 5 with respect to these assignments, are all essential to support her husband's asserted ground for discharging Brown. As a co-manager of Respondent, and wife of the owner, it was her natural inclination to corroborate Hackenberger's testimony. I do not believe the testimony of either and they are discredited based upon my general mistrust, as set forth above, as well as the further highly questionable aspects of their testimony as set forth below.

Firstly, based on Brown's credited testimony, I find that there was no assignment of Sunday work in his box on Saturday evening when he quit for the day. I further find that Respondent had no fixed procedures whereby the various drivers who were not scheduled for Sunday work were required to call in to obtain their next work assignment.[9] Thus, Brown's

9. I discredit Ron Hackenberger's testimony that under established procedures, a driver who receives no work assignment is required to contact the Hackenbergers. Hackenberger, on questioning by his own counsel, testified that under the old method of assigning trips, it would be normal for either of the Hackenbergers to call an

reporting for work at 6 a.m. Monday morning was not unusual or improper. Indeed that Brown's action in this respect entailed no breach of company rules or practices explains the failure of Eunice Hackenberger to mention any missed loads to Brown during her confrontation with him as late as 6:30 p.m. Monday evening. Considering the fact that Mrs. Hackenberger was responsible for making work assignments, I cannot believe that she would not have mentioned the three successive missed loads by Brown, if he in fact had in any sense been derilect under established Company procedure. Mrs. Hackenberger not only failed to mention the missed loads to Brown at 6:30 p.m. on Monday evening, but she, at that time, assigned him an alternate load thereafter.

Other questions which emerge from Ron Hackenberger's testimony contribute to Brown's credibility and further support the inference that the missed Sunday hauls were never in fact assigned. Thus, Hackenberger testified that, as a matter of policy, the failure to report for work and the missing of loads was a serious offense, and that in the period proximate to Brown's

(Footnote Continued)

employee, or for an employee to call them, concerning his next days' work schedule. Hackenberger, on examination by the General Counsel, testified that under the new system if a work assignment card was not in the box, a driver was required to check with the Hackenbergers to see what he would be doing on his next tour of duty. The origin however of this requirement was muddled by the fact that the old system included no such requirement, and also by implication rising from Hackenberger's subsequent testimony, the sense of which, is that drivers were never told of any such requirement. This is highly significant, for, Brown's failure to call in on Sunday was apparently the first incident of its kind under a system that had been in effect for but 1 week. Aside from my reservations, already expressed concerning Hackenberger's credibility, this aspect of Hackenberger's testimony suggests that he was not above tailoring facts to meet the needs of the defense.

discharge, some six other drivers were terminated on this very ground. Considering this testimony, against Hackenberger's portrayal of Brown as a poor driver with a record for an abuse of trucks and violation of other company rules, it is difficult to understand why Hackenberger after Brown had missed two loads on Sunday decided that afternoon, when Brown had still not appeared, to give Brown another chance. No explanation was offered as to the reasons behind such leniency in the light of Brown's work history and the seriousness of this most-recent alleged offense. But the puzzling nature of Hackenberger's alleged actions does not end there. For, in giving Brown a second chance, the Hackenbergers indicate, that between 2 and 3 p.m. on Sunday afternoon, Brown was assigned a load which would have required him to report on Monday morning at 2 a.m. There is no evidence that assignments, requiring a driver present at such an unusual hour, are regularly incident to Respondent's operations. The inherent unfairness of this assignment, as a so-called "second chance," suggests that it was not that at all.

My disbelief of Respondent's testimony that Brown was assigned, or missed, any loads on September 22, suggests that the events of that day were contrived by the Hackenbergers, who, probably, were mindful of the likelihood that Brown would miss his first assignment on Monday, and did not regard this incident as sufficiently serious to warrant his discharge. Contrary to this analysis, Ron Hackenberger would have me believe that he decided to discharge Brown early Monday morning upon discovery that Brown had missed the 2 a.m. load. However, had that been the case, a question would arise as to why Mrs. Hackenberger,

at 6:30 p.m. Monday evening, assigned Brown another load, without referring to the decision or any irregularities on Brown's part. In my opinion, the truth lies elsewhere. Thus, as will be recalled, Reddix, a newly hired driver, credibly testified that, after returning from a trip that same Monday, he made Mrs. Hackenberger aware of Brown's having discussed union representation with him. Other considerations point to the strong probability that it was this latter conversation which prompted the discharge, and that the actual decision to do so was made by the Hackenbergers sometime after Reddix had spoken to Mrs. Hackenberger. Thus, Ron Hackenberger admitted that Brown's union activity had some influence upon his decision. Yet, according to Hackenberger's testimony, the report from Reddix was his sole source of direct knowledge, prior to the discharge, of Brown's union involvement. That the decision was made with the benefit of this information is further suggested by Hackenberger's having made an admission that the accusation he directed to Brown, at the time of the discharge, that Brown was agitating, was intended as a reference to Brown's having discussed the Union with Reddix. Hackenberger, quite obviously, would have had no knowledge of the Reddix-Brown conversation at the time he alleges to have made the discharge decision.

In sum, as the General Counsel's *prima facie* has not been countered by credible evidence establishing a lawful basis for the discharge, the illegality thereof has been established without necessity for further findings. However, in the interest of clarity, I shall go beyond that in this decision, for upon application of the probabilities to the testimony, as a whole, a picture of what actually occurred emerges. Ac-

cordingly, it is my opinion, based upon the total record, that it was the Reddix report to Mrs. Hackenberger which triggered and provided the dominant cause for the discharge; and that the Hackenbergers, in search of a pretext, were, for obvious reasons, reluctant to rely upon the missed 2 a.m. Monday assignment, and therefore contrived the Sunday missed loads to lend an aura of respectability to the discharge decision and to further mask the true reason for the termination of Brown. In any event, I find that Respondent has failed to substantiate the defense, and accordingly I find that the General Counsel has established by a preponderance of the evidence that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Brown because of his union activities.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging William F. Brown, Sr., because of his union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action necessary to effecutate the policies of the Act.

I shall recommend that Respondent offer immediate reinstatement to William F. Brown, Sr., to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from the date of his discharge, to the date of a valid offer of reinstatement, less his net earnings during that period. Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Ronald Hackenberger, d/b/a Ron's Trucking Service, Norwalk, Ohio, its officers, agents, successors, and assigns, shall:

---

10. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discouraging membership in any labor organization, by discharging employees or in any other manner discriminating against them in regard to their hire or tenure of employment or with respect to any term or condition of employment.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Offer William F. Brown, Sr., immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the unlawful discharge, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in analyzing the amount of backpay due and the right to reinstatement and employment under the terms provided by this Order.

(c) Post at its Norwalk, Ohio, facility the attached notice marked "Appendix."[11] Copies of said notice on

---

11. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES

forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C. January 29, 1975.

/s/ JOEL A. HARMATZ
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

WE WILL NOT discharge any employee or otherwise discrminate against him because of his membership, or activities on behalf of, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 20, or any other labor organization.

(Footnote Continued)

COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer William F. Brown, Sr., immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings suffered by reason of his unlawful discharge.

Ronald's Hackenberger, d/b/a
Ron's Trucking Service
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Suite 1695, Anthony J. Celebrezze, Federal Building, 1240 E. 9th St., Cleveland, Ohio 44199 (Tel. No. 216—522-3715).

No. 75-1803

Supreme Court, U. S.
FILED
AUG 9 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

RONALD HACKENBERGER d/b/a
RON'S TRUCKING SERVICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
CANDACE M. CARROLL,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1803

RONALD HACKENBERGER d/b/a
RON'S TRUCKING SERVICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A2-A4) is not reported. The Board's decision and order (Pet. App. A4-A28) are reported at 217 NLRB No. 128.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1976 (Pet. App. A2). A petition for rehearing *en banc* was denied on April 27, 1976 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on June 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in unfair labor practice proceedings, an employer is entitled to obtain a list of witnesses that the General Counsel intends to call and to take depositions for the purpose of discovery.[1]

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations are set forth in the Appendix, *infra,* pp. 1a-5a.

STATEMENT

In July 1974, petitioner hired William Brown as a truck driver (Pet. App. A10). Brown thereafter met with Union[2] representatives to discuss the possibility of organizing the Company; petitioner learned of the meeting (Pet. App. A10-A11). Subsequently, Brown discussed the Union with various employees and solicited their signatures on union authorization cards (Pet. App. A11); petitioner also learned of these solicitations (Pet. App. A12 and n. 4, A23). On September 24, 1974, petitioner reprimanded Brown for failing to report for work on the previous Sunday, and stated that Brown had become a "union agitator," and that he was fired (Pet. App. A12).

Brown thereafter filed an unfair labor practice charge with the Board. On November 8, 1974, the Board issued a complaint, alleging that the Company had violated Section 8(a)(3) and (1) of the Act by discharging Brown

---

[1]A similar question is presented in *Valley Mold Company, Inc.* v. *National Labor Relations Board*, No. 75-1661, which is now pending before this Court on petition for a writ of certiorari.

[2]Local Union No. 20 of the International Brotherhood of Teamsters.

because of his Union activities (Pet. App. A6), and notifying the Company that a hearing was scheduled for December 5, 1974 (Pet. App. A8; C.A. App. 25-28, 55).[3]

On November 22, 1974, the Company filed with the Regional Director a request for a list of witnesses that the General Counsel intended to call at the hearing; notified the Regional Director that "pursuant to Section 10(b) of the LMRA and pursuant to Rule 30, Federal Rules of Civil Procedure" the Company intended to depose William Brown and reserved the right to depose other witnesses to be called (C.A. App. 36); and moved for a continuance of the hearing on the ground, *inter alia*, that the Company needed time in which to complete such prehearing discovery (Pet. App. A7; C.A. App. 35). The Regional Director, treating the Company's notice of intent to take depositions as a request for permission to do so, denied this request and the request for a witness list on the ground that the Company had failed to show "good cause" for taking such depositions as required by the Board's Rules and Regulations (29 C.F.R. 102.30; App., *infra,* pp. 1a-2a), and further denied the Company's motion for a continuance (C.A. App. 39-40).

At the commencement of the hearing before the Administrative Law Judge, the Company renewed its motion for discovery of the list and for a continuance to depose witness (Pet. App. A7; C.A. App. 52-58).[4] The Law

---

[3]"C.A. App." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[4]The Law Judge assured the Company, however, that he would reconsider the request for a continuance to depose witnesses if complex or unforeseen issues were raised in the General Counsel's case (Pet. App. A8; C.A. App. 58). At no time during the hearing did the Company renew its request for a continuance to depose witnesses or indicate that it was surprised or handicapped by lack of preparation (Pet. App. A8).

Judge denied these requests, and thereafter found that the Company had violated Section 8(a)(3) and (1) of the Act by discharging Brown for his Union activities rather than for his failure to appear for work (Pet. App. A10-A24).[5]

The Company thereafter filed exceptions with the Board. The Board rejected the Company's contention that the denials of its motions for discovery of the witness list and for a continuance to take depositions deprived it of due process (Pet. App. A4-A5, A6-A8), and affirmed the Law Judge's finding that Brown had been discharged for his Union activities. The Board ordered the Company, *inter alia*, to reinstate Brown with backpay (Pet. App. A4-A5, A25-A27).

The court of appeals enforced the Board's order (Pet. App. A2-A4), relying upon its recent decision in *National Labor Relations Board* v. *Valley Mold Company, Inc.*, 530 F. 2d 693,[6] in which it held that there is no entitlement to discovery in such administrative proceedings.

ARGUMENT

1. Petitioner contends (Pet. 10-13) that it was denied due process by the denial of its requests to obtain a list of witnesses that the General Counsel intended to call at the unfair labor practice hearing, and for a continuance to take prehearing depositions of Brown and any other witnesses to be called. It is established, however, that the Fifth Amendment does not require that parties to Labor Board proceedings be permitted such prehearing discovery. *National Labor Relations Board* v. *Valley Mold*

[5]The General Counsel called five witnesses, including petitioner, Brown, two other employees, and a Union representative (C.A. App. 61, 84, 85, 104, 106).

[6]See n. 1, *supra*.

Company, Inc., supra; *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 857-858 (C.A. 2), certiorari denied, 402 U.S. 915; cf. *Starr* v. *Commissioner*, 226 F. 2d 721, 722 (C.A. 7), certiorari denied, 350 U.S. 993.[7]

2. The Administrative Law Judge did not abuse his discretion in denying petitioner's requests for a witness list and continuance for the purpose of taking prehearing depositions. Board Rule 102.30(a) (29 C.F.R. 102.30(a); App., *infra*, pp. 1a-2a), provides that an Administrative Law Judge may permit prehearing depositions "if in his discretion good cause has been shown." Here, the Company had full opportunity at the hearing to cross-examine every witness called by the General Counsel. Moreover, the Law Judge assured the Company that it could renew its request for a continuance to depose witnesses should it be surprised by the General Counsel's evidence; the Company did not renew its request. Accordingly, petitioner was not prejudiced by its inability to depose witnesses.[8]

[7]Petitioner's reliance on *Morgan* v. *United States*, 304 U.S. 1, and *Hannah* v. *Larche*, 363 U.S. 420, is misplaced. In *Morgan* the Court held that a litigant before an administrative agency has a right to "know the claims * * * presented and to contest them." 304 U.S. at 22. Petitioner was fully afforded that opportunity here. In *Hannah*, the Court held that, in the specific administrative proceeding there involved, which was solely investigative, the person investigated did not have a right to confront and cross-examine accusers and to know the specific charges against him. Petitioner was afforded those rights here.

[8]The only "prejudice" asserted by petitioner from its inability to depose witnesses here was the resulting denial of an opportunity to obtain "information necessary to discredit an opposing witness" and "advance notice of the position which his adversary is taking" (Pet. 16). These disadvantages presumably are shared by all litigants in administrative proceedings who are not entitled to prehearing discovery, however, and therefore did not constitute particular prejudice to petitioner.

Contrary to petitioner's contention (Pet. 13-17), there is no conflict among the circuits on this issue. Although the circuits are in some disagreement as to the appropriate scope of the Law Judge's discretion to find "good cause" to permit depositions,[9] there is no disagreement that refusal to permit depositions in an unfair labor practice proceeding is not an abuse of discretion where, as here, there has been no prejudice. *Electromec Design and Development Company* v. *National Labor Relations Board*, 409 F. 2d 631, 635 (C.A. 9); *National Labor Relations Board* v. *Rex Disposables*, 494 F. 2d 588, 592 (C.A. 5); *Winn-Dixie Stores, Inc.* v. *National Labor Relations Board*, 413 F. 2d 1008, 1010 (C.A. 5); *National Labor Relations Board* v. *Gleason*, 534 F. 2d 466, 481 (C.A. 2).

~~1976.~~ 6

[9]The Second Circuit and the Board have held that, under the Board's rules, an Administrative Law Judge may find "good cause" to permit the taking of depositions only when the witness to be deposed is likely to be unavailable at the hearing. *National Labor Relations Board* v. *Interboro Contractors, Inc., supra*, 432 F. 2d at 860-861; the Fifth Circuit has held that the Law Judge has discretion to find "good cause" so long as depositions are practicable under the circumstances and they are not used to harass or coerce employees. *National Labor Relations Board* v. *Miami Coca-Cola Bottling Company*, 403 F. 2d 994, 996. See also *National Labor Relations Board* v. *Safway Steel Scaffolds Company of Georgia*, 383 F. 2d 273, 277 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
CANDACE M. CARROLL,
Attorneys,
National Labor Relations Board.

AUGUST 1976.

DOJ-1976-08

APPENDIX

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat 519, 29 U.S.C. 151, *et seq.*), is as follows:

SECTION 10.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to [Section 2072 of Title 28].

The relevant provisions of the National Labor Relations Board Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are as follows:

SEC. 102.30 *Examination of witnesses; depositions.*—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post

office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50. Such application shall be served upon the regional director or the administrative law judge, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the administrative law judge.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the

examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the administrative law judge, care of the chief administrative law judge in Washington, D.C., or associate chief administrative law judge, San Francisco, Calif., as the case may be.

(d) The administrative law judge shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

* * * * *

SEC. 102.118 *Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony.*

(a) Except as provided in section 102.117 of this part respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board; or of the general counsel if

the document is in a regional office of the agency or is in Washington, D.C., and in the control of the general counsel. * * *